IN THE HIGH COURT OF GUJARAT AT AHMEDABAD.

FIRST APPEAL NO 969 OF 1994

For Approval and Signature :

Hon'ble MR. JUSTICE B.J.SHETHNA

and

Hon'ble MR. JUSTICE N.G.NANDI

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1. Whether Reporters of Local Papers may be allowed to see the Order ?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Order ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

VERSUS

MAHENDRAKUMAR PARSHOTTAMBHAI DESAI

Appearance:

MR KB TRIVEDI, ADDL. A.G. with MR SEN, AGP for Petitioners No.1-2

MR MJ THAKORE for Respondent Nos.1-16

MR SB VAKIL for Respodnent No.1

MR SN THAKKAR for Respodnents No.2-3

MR KG VAKHARIA, SR. ADVOCATE with
MR TUSHAR MEHTA for Respondents No.6-9

CORAM : MR JUSTICE B.J.SHETHNA
and
MR JUSTICE N.G.NANDI

Date of Order : 7/05/2002

CAV JUDGMENT

#. This appeal is filed by the appellant-State of Gujarat through Collector, Vadodara challenging the judgment and decree dated 13.5.1994 passed by 3rd Joint Civil Judge (S.D.), Vadodara in Special Civil Suit No.776/92 filed by the appellant-plaintiff-State of Gujarat against the respondents.

#. It is the case of the appellant-plaintiff-State of Gujarat that the land bearing City Survey No.1/A/2 shown in the city survey map part : B Tikkar No.27/15, 26/16, 27/17 at Vadodara having nature of Possession `A' admeasuring 1,28,073 sq. mtrs. i.e. about 53 vighas and 17 vasas is in the possession and ownership of the State of Gujarat. The said land was running in the Government record in the name of Government for Fatehsinh Regiment and the said land was never in possession of the defendant No.1-Mahendrakumar Purshottambhai Desai and the same was not of his ownership. The said land was used for Fatehsinh Regiment. When measurement of City Survey No.1 was taken the land admeasuring 1,28,073 sq. mtr. i.e. 53 vighas and 17 vasas were issued separate property card No.1/A/2 and the same was included in Tikkar No.27/15, 26/16 and 27/17.

#. On 23.9.1960 one Shri Jayantikumar Patel of Gujarat Roadway Hotel made a demand of the aforesaid land from the Government on ownership lease basis. The defendant No.1 Mahendrakumar came to know about the same during the inquiry being made, therefore, he submitted his objection on 26.11.1962 with regard to the disputed land and claimed the ownership of the said land of village Savad. The said objection application was sent for further inquiry to City Survey Officer, Vadodara, who by letter dated 19.2.1963 informed that the said land is Government land. Thereupon the Collector, Vadodara by his order dated 12.8.1963 sent the matter to Mamlatdar,

Vadodara for making inquiry under Section 37(2) of the Land Revenue Code. However, during midst of the inquiry the Collector by his order dated 17.2.1964 transferred the said inquiry to the Assistant Collector, Vadodara from Mamlatdar. The Assistant Collector, Vadodara by his order dated 1.6.1964 decided the matter in favour of the defendant No.1 and held that the land is of ownership of the defendant No.1 However, Collector, Vadodara by his order dated 9.9.1964 quashed the aforesaid order dated 1.6.1964 passed by the Assistant Collector in his suo motu revisional jurisdiction and ordered to make fresh inquiry in the matter.

#. On remand, this time the Assistant Collector, Vadodara by his order dated 30.11.1966 held that the disputed land is part of parade ground and it is the ownership of the Government. Aggrieved of this order, the defendant No.1 filed Appeal No.4/67 before the Collector, Vadodara, which was dismissed on 9.8.1968 by the Collector, Vadodara. The defendant No.1 challenged that the order in Appeal No.137/68 before the Gujarat Revenue Tribunal. The learned Tribunal by its order dated 11.7.1969 set aside the orders passed by the Assistant Collector as well as Collector, Vadodara and once again remanded the matter to the Assistant Collector, Vadodara for fresh inquiry on certain points. However, the Assistant Collector, Vadodara by his order dated 7.4.1980 once again decided the matter against the defendant No.1. The same was once again challenged before the Tribunal by way of Appeal No.151/80 but the same was returned back by the Tribunal on 13.11.1981 on the ground that it had no jurisdiction.

#. Under the circumstances, the defendant challenged the order dated 7.4.1985 by way of Appeal No.15/89 before the Collector, Vadodara who by his order dated 14.5.1983 dismissed the same. The said order was challenged by the defendant in appeal before the Gujarat Revenue Tribunal and this time the learned Tribunal allowed the appeal of the defendant by its judgment and order dated 29.11.1991 and set aside the orders passed by Collector as well as Deputy Collector and held that the land in question was in possession, occupation and ownership of the defendant No.1. It may be stated that this order passed by learned Tribunal was initially unsuccessfully challenged by the present appellant-plaintiff before this court by way of writ petition i.e. Special Civil Application No.6428/92.

#. After the pronouncement of the aforesaid judgment and order passed by the learned tribunal the defendant initially proceeded under the Urban Land (Ceiling and Regulation) Act and obtained sanction under Section 21(1) of the Housing Scheme for construction of the house on the disputed land for the weaker section of the society and made provision for carrying out construction activity on the suit land by calling labourers for digging the land. But they were prevented, therefore, the plaintiff filed Special Civil Suit No.1131/92 before the court of Civil Judge (S.D.), Vadodara against (1) State of Gujarat; (2) Commander, SRP Group No.1; (3) Principal, Police Training School etc. wherein prayed for ad interim injunction against the defendants and their officers from restraining the defendants from carrying out any construction activity. Learned Civil Judge (S.D.) granted such injunction in favour of the plaintiff below application Ex.5. Against that the State Government filed Appeal from Order being Misc. Application No.194/92 before the court of District Judge, Vadodara. The same was allowed by the learned Joint District Judge and the order passed below Ex.5 by the Civil Judge below Ex.5 Special Civil Suit No.1131/92 was set aside. The same was challenged by the defendants before this court by way of Special Civil Application No.134/92 and the same was pending.

#. It may be stated that in the appeal No.36/90 filed by the defendant No.1, the learned Tribunal held that the land is of ownership and in possession of the defendant No.1. The proceedings under Section 37(2) of the Land Revenue Code are the proceedings of formal inquiry with respect to the right / title and in the proceedings under this section, Revenue Tribunal or Revenue Officer has no right to decide the right / title and in spite of this it has been held by the Tribunal that the ownership and occupation of the suit land is of the defendant No.1, which is absolutely unjust and illegal. Since the Revenue Tribunal had no right, authority or jurisdiction to decide the title of the suit land, the impugned judgment and order passed by the learned Tribunal on 29.11.1991 in Appeal No.36/90 was illegal and against settled principles of law and, therefore, not binding to the Government. Accordingly, the State Government filed present Civil Suit No.776/92 before the 3rd Joint Civil Judge (S.D.), Vadodara and prayed that the impugned judgment and order passed by

the learned Tribunal on 29.11.1991 in Appeal No.36/90 be declared as illegal. Initially, defendant No.1 claimed to be sole owner but with a view to avoid future dispute the defendant Nos.2 to 16 were also joined as defendants in the suit. According to the appellant-plaintiff the cause of action to file the suit in question arose on 29.11.1991 when learned Tribunal pronounced its judgment against the appellant-plaintiff and in favour of the defendant No.1. It is prayed in the suit by the present appellant-plaintiff that (a) to declare the judgment and order dated 29.11.1991 passed by the Gujarat Revenue Tribunal in Appeal No.36/90 was bad in law, illegal and without jurisdiction and not binding to the appellant-plaintiff and, therefore, the same may be quashed; (b) to declare that the suit property described in para 1 of the plaint be of the ownership of the State Government and it was in occupation and user of the State Government and (c) to declare that the defendants and their associate persons, contractors or developer have no right, title or interest or authority to enter into suit land and further to issue permanent injunction restraining them from carrying on any further construction activity on the suit land and passed such order or orders as may be deemed fit by the court.

#. The defendant in his written statement Ex.15 contended that the facts stated in the plaint are not true, therefore, not acceptable. The court fees was not properly paid and the suit for declaration of right / title of the plaintiff and for quashing and setting aside the order dated 29.11.1991 passed by the Tribunal was filed beyond the period of limitation, therefore, on this ground alone the suit may be dismissed. It is also contended that the suit was not bona fide and they are the owners of the land. It was further contended that after pronouncement of the decision of the Tribunal the City Survey Department prepared different maps with regard to ownership rights by taking measurements of the disputed lands in presence of all parties. When survey of disputed land was carried out through the City Survey Department, the officers of the concerned department were present and by that time also they admitted genuineness and correctness of the measurement. It was further contended that after making as to the rights of the plaintiff as well as defendants were affixed through City Survey Department. They (defendants) started construction of compound wall on the land, at that time head of

the Police Training School, Shri Tuteja raised dispute and threatened the persons working on the land. Thereupon they had to file suit and obtained ex-parte injunction which was confirmed after by-parte hearing. The same was quashed and set aside by the District Court in appeal. Against the said order, they (defendants) preferred revision application before this court which was pending. It is further contended that in the meanwhile the plaintiff-State of Gujarat filed Special Civil Application before this court against the impugned order passed by the Tribunal. It was dismissed and thereafter they have filed the present suit which may be dismissed with costs as the same was false and vexatious.

#. Following issues were framed by the learned Judge in the suit :-

"(1) Whether the plaintiff proves that the suit land is of their ownership?

(2) Whether the plaintiff proves that the suit land admeasuring 53 vighas 17 vasas has been acquired during the time of erstwhile Baroda State and possession thereof was handed over to Fatehsinh Regiment?

(3) Whether the plaintiff proves that the plaintiff is having legal possession of the disputed land by way of ownership right thereof?

(4) Whether the plaintiff proves that the order dated 29.11.1991 passed by the Gujarat Revenue Tribunal is illegal, without jurisdiction and, therefore, null and void?

(5) Whether the defendant proves that out of 138 vighas and 19 vasa of land, the erstwhile Baroda State had acquired 85 vighas and 01 vasa of land and remaining 53 vighas and 18 vasa of land was in possession of the defendant as stated by the defendant in para 5-3 of his reply?

(6) Whether the defendant proves that survey No.371 consists of 25 vighas 12

vasa of land and survey No.372 consists of 28 vighas and 6 visa of land as stated in para 5(3) of the written reply of the defendant?

(7) Whether the defendant proves that the suit of the plaintiff for decision on the ownership of the suit property in favour of the plaintiff, is barred by period of limitation? And further whether the same is without jurisdiction with respect to the order passed by the revenue Tribunal?

##. First four issues were decided against plaintiff and remaining 3 issues were decided in favour of the defendants by the learned Judge by his impugned judgment and decree dated 21.3.1994 whereby the learned Judge dismissed the suit with costs which is challenged in this appeal by the plaintiff.

##. Learned AAG Shri Kamal Trivedi for the appellant-plaintiff-State of Gujarat vehemently submitted that the learned Judge erred in deciding issue No.1 viz. "Whether the plaintiff proves that the suit land is of their ownership?" He submitted that for deciding the aforesaid issue against the appellant-plaintiff, the learned Judge mainly relied upon Fesal Patrak i.e. form No.1 produced at Exh.391 and certified copies thereof produced at Ex.223 and 458, which show that 25 vighas and 12 vasas of land of survey No.371 and 28 vighas 6 vasas of land of survey No.372 in all 53 vighas 18 vasas in the name of Desai Sureshwar Narbheram. He submitted that the certified copies at Ex.223 and 458 were tampered with, therefore, no reliance can be placed on it by the learned Judge. Mr.Trivedi further submitted that similarly Inquiry Register produced at Exhs.408 and 409 were also tampered with, which indicates name of Desai Motilal Amrutlal in column 12 thereof in respect of the said land with its description in column 11. We cannot accept the submission of Mr.Trivedi that the learned Judge has relied upon the aforesaid documents, which are tampered. Subsequent Civil Applications No.964, 1150 of 2002 and Civil Application No.4849 of 2000 filed in this appeal that those documents have been tampered are dismissed not only by this Bench by separate order but also by another Division Bench in 2000. Under the

circumstances, it cannot be said that the learned Judge was wrong in relying upon the aforesaid documents.

##. Mr.Trivedi then submitted that the learned Judge was wrong in holding that various private agreements produced at Ex.192 to 196 in respect of the suit land show that the said land was given on rent by the defendants to various parties and out of the total land of 138 vighas and 17 vasas of Fatehsinh Regiment during erstwhile Gaekwad Government, 85 vighas and 01 vasas of land was admittedly acquired. Mr.Trivedi submitted that the learned Judge was absolutely wrong in holding that the plaintiff failed to prove as to how they got the remaining land admeasuring 53 vighas and 17 vasas. This finding is arrived at by the learned Judge on the basis of the evidence led before him. We cannot accept this submission of Mr.Trivedi as whatever evidence which is relied upon by the learned Judge, while dismissing the suit of the plaintiff, was Government record.

##. Mr.Trivedi, learned AAG then submitted that the learned Judge has simply overlooked the documentary evidence like Pahani Patrak, village form No.3 produced at Exh.486 for the period from 1901 to 1903 which shows that 2 vighas and 12 vasas were against survey No.371 as 2 vighas and 0 vasas in respect of survey No.372. Thus, the total land under aforesaid two survey numbers 371 and 372 was only 4 vighas and 12 vasas and it can never be 53 vighas and 17 vasas as held by the learned Judge. Mr.Trivedi submitted that this important aspect of the case was overlooked by the learned Judge while deciding the suit. Mr.Trivedi also submitted that extract from Hali Maji Patrak for the year 1912 Exh.489 clearly shows that it was 2 vighas and 12 vasas of land of survey No.371 and 2 vighas and 0 vasas land of survey No.372 as Government land. But the same was not taken into consideration by the learned Judge. Similarly, notification (patrika) (`Agna Patrika') dated 14.10.1915 at mark 28/3 was also not properly considered by the learned Judge. At this stage, we may state that notification (patrika) was never exhibited as same was not proved, and, therefore, it was only given mark 28/2. Under the circumstances, there was no question of taking the same into consideration by the Trial Court.

##. Mr.Trivedi then submitted that property card Ex.418 does not show the suit land in the name of

defendants. Such an important piece of evidence was not at all discussed and considered by the learned Judge in his impugned judgment. Mr.Trivedi also submitted that map Exh.392 clearly suggest that both the survey Nos.371 and 372 appears to be smaller one and it can never be of 53 vighas and 17 vasas. He submitted that the said map was produced by Gulamnabi Rasul Shaikh at Exh.25 from City Survey Office, which is explained in his cross-examination as to how the actual measurement of the land on both the survey numbers was effected and how the said map was prepared. But, unfortunately, the learned Judge simply discarded the said map on the ground that Shri Shaikh has not produced requisite survey record or any register in that behalf.

##. However, learned Senior Advocate Shri Vakharia for the respondents-defendants vehemently submitted that their witness Gulamnabi Rasul Shaikh Ex.25 has clearly admitted in para 14 of his evidence that prior to the acquisition of the land for Fatehsinh Regiment the total lands admeasuring 138 vighas 19 vasas was of private ownership. Mr.Vakharia further submitted that ownership was of the defendants' ancestors and out of the aforesaid land, only 85 vighas and 1 vasa of the land was acquired for Fatehsinh Regiment for erstwhile Baroda State and remaining land of 53 vighas and 18 vasas, were never acquired and there is nothing on record to show that the said land was acquired by erstwhile Government. He submitted that if there is evidence only with regard to the acquisition of 85 vighas and 1 vasa of the land by the Government then only conclusion which can be arrived at is that the remaining land of 53 vighas and 18 vasas was of the ownership of the defendants.

There is a lot of substance in the submission made by Mr.Vakharia. Admittedly, the entire land of 138 vighas 19 vasas belong to the defendants' ancestors. It may be stated that Gulamnabi Shaikh Ex.25 has admitted in his evidence that except the land mentioned in Mark 189 there is no endorsement for other land for the acquisition of Fatehsinh Regiment. This admission was made by Shri Shaikh Ex.25 after referring to original `Fesal Patrak' and the plaintiff has produced certified copy of the said Fesal Patrak Exh.458. In that view of the matter, we are of the considered opinion that the learned Judge has rightly relied upon the Fesal Patrak and rightly not placed any reliance upon Pahani Patrak Ex.486,

Hali-maji Patrak Ex.439 and notification dated 14.10.1915 mark 28/3.

##. Mr.Vakharia drew our attention to the impugned judgment dated 29.11.1991 rendered by the Gujarat Revenue Tribunal. In the said judgment the Tribunal observed that;

"the fesal patrak of B-Tika No.27/16 is produced at page 55 of Batch No.4, wherein the names of ancestors of the appellant Motilal Amrutlal and Fatehsinh Regiment are shown for possessing the land which admeasured 3,94,062 sq.yards".....

"Shri Shah has also argued that witness Laljibhai S. Bhoi (page 55 - Batch No.3) was examined by the Asstt. Collector at the first instance on 9-4-1964 when he had remained present with all the documents and maps pertaining to the suit land and the land acquired under the 3 awards and after comparing the maps with the maps produced by the appellant, he was categorically of the opinion that the B-Tika No.27/15, 27/16 and 27/17 contained the disputed land belonging to the appellant. He had also given the survey numbers of the acquired land which are S.Nos.360, 361, 363 and 364. He has, therefore, argued that the case of the appellant was fully proved by documentary evidence and maps which were brought by Laljibhai Bhoi, but the same were not produced by him. Witness Vitthalbhai Shivabhai (p.53 Batch No.3) also supported the case of the appellant who had deposed that the suit land S.Nos.371 and 372 of village Sawad was land which remained with the ancestors of the appellant".....

"Witness Laljibhai Bhoi has categorically deposed that he was present before the Asst. Collector with the remand pertaining to S.No.371 and 372 and the maps pertaining to the same and from these documents he deposed that S.Nos.371 and 372 admeasuring 53 Bigha 11 vasa belonged to the appellant. Thereafter the other side has concealed all the documents and has not produced them before the inquiry officer the Dy.Collector. witness Goddaste, has categorically deposed that the important

revenue records viz. Prati Book field Book and General Register pertaining to the suit survey number is missing or the pages pertaining to these two survey numbers are missing from these registers. What does this mean? This means that the documents pertaining to S.Nos.371 and 372 are deliberately taken out from the field book and the General Register only with a view to defeat the right of the appellant.".....

"From the arguments advanced by learned advocate Shri Shah and from the records it is clear that the appellant was holding S.No.371 admeasuring 25 Bigha 12 vasa and S.No.372 admeasuring 28 Bigha and 6 vasa vide Zenal Patrak produced at page 53, Batch 4. The same pertains to the year 1892 AD. Similarly, the Fesal Patrak for S.No.360, 361, 363 and 364 is produced at page 71 of Batch No.2. As argued by learned advocate Shri Shah these four survey numbers pertain to the same land which was acquired by 3 different awards in the year 1895 belonging to the grandfather of the appellant. The total of these four survey numbers comes to 95 Bigha and 1 vasa, while total of S.Nos.371 and 372 comes to 54 Bigha and 17 vasa. The total of these two comes to 138 Bigha and 17 vasa, which is the land of B-Tika No.17/16, produced at page 71 of Batch No.2 which admeasured 3,94,062 sq.yards equal to approximately 138 Bighas 11 vasa. In the result, the land belonging to the appellant viz. S.Nos.371 and 372 is included in a Tika No.27/16 and it is clearly mentioned in column No.12 that Desai Motilal Amrutlal along with Fatehsinh Regiment are in possession of these lands.".....

##. From the aforesaid finding recorded in the judgment of the learned Tribunal Mr.Vakharia submitted that there is a reference to `Fesal Patrak' and the deposition of witness Laljibhai Bhoi and other two witnesses and other documentary evidence, but nowhere in the plaint the judgment is sought to be challenged on the ground that Fesal Patrak was interpolated or that fraud is committed. Mr.Vakharia, therefore, submitted that when the learned Judge has preferred to rely upon the

documentary evidence like Fesal Patrak, inquiry register and various other agreement produced at Exh.192 to 196 for coming to the conclusion that the land is of the ownership and possession of the defendant then this court should not interfere with such finding as the learned Judge has based his judgment on the basis of the Government's own record.

##. Mr.Vakharia also submitted that no reliance can be placed on Hali-maji Patrak Ex.489 because it is an admitted fact that the said Hali-maji Patrak was prepared on the basis of Fesal Patrak and the certified copy of the Fesal Patrak shows that measurement of survey No.371 was 28 vighas and 6 vasas. For appreciating this submission of Mr.Vakharia, we have to consider the evidence of witness Gulamnabi Shaikh, who has clearly stated in his evidence that Hali-maji Patrak was prepared for the use of the Government and if there is any mistake in the Fesal Patrak then it is required to be corrected in accordance with law. Mistake in Hali-maji Patrak is required to be corrected as per Fesal Patrak. In view of this we are of the opinion that no reliance can be pleased on Hali-maji Patrak.

##. Regarding map Ex.392 it was submitted by Mr.Vakharia that there is a detailed cross-examination of Gulamnabi Shaikh Ex.25 on this point. Shri Shaikh has stated in his evidence that the measurement of survey number in Mark 392 can be verified through planimeter and on the basis of the multiplication of the measurement in the field book area of the land can be verified. He has admitted that the area of the survey numbers mentioned in map Exh. 392 can be measured by planimeter without field book and the measurement of the area of survey number shown in map Exh.392 cannot be verified from the map. From this admission not much importance can be attached to map Ex.392. Mr.Vakharia then drew our attention to property card which was produced on record as mark 386. The same was prepared after the judgment of the Tribunal which was pronounced on 29.11.1991 and as per the endorsement made on 22.4.1992, the land was measured.

We find lot of substance in the aforesaid submission made by Shri Vakharia. On one hand there is a documentary evidence viz. map Exh.392 for which there is a detailed cross-examination of witness Mr.Shaikh, who produced the same and on the other hand there is Fesal Patrak Exh.458, agreements

Exh.192 to 196 and inquiry register Exhs.408 and 409. They are part of Government records, therefore, when the learned Judge has preferred to rely upon one set of evidence, which is in favour of the defendants, then it would be difficult for this court to take a different view of the matter in the appeal because the Trial Judge had the opportunity to mark the demeanor of the witnesses and after considering their oral evidence coupled with documentary evidence if the learned Judge has thought it fit to rely upon one set of evidence, which is in favour of the defendants then this court would not take different view of the matter in appeal.

##. In view of the above discussion, we do not see any reason to interfere with the judgment and decree passed by the learned Judge dismissing the suit of the plaintiff. Accordingly, this appeal fails and is hereby dismissed with costs.

Sd/-
(B.J.Shethna, J.)
Sd/-
(N.G.Nandi, J.)

After the pronouncement of the aforesaid judgment a request is made by learned AAG, Shri Kamal Trivedi to stay the operation of the judgment and decree passed by this court because according to Shri Trivedi the appellant is in possession. However, as per the submission of learned Senior Advocate Shri Vakharia and Shri Vakil appearing for the respondents, they are in possession. In that view of the matter, we are of the considered opinion that with a view to enable the appellant to approach the Hon'ble Supreme Court, status quo as on today as regards physical possession of the land in question be maintained by the parties for a period of three months from today.

Sd/-
(B.J.Shethna, J.)
Sd/-
(N.G.Nandi, J.)
*Pvv